

No. 15603

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United States  
Court of Appeals  
for the Ninth Circuit

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CONVERSE TRUCKING SERVICE, a Corpora-  
tion and DONALD H. NOTEBOOM,

Appellants,

vs.

PACIFIC INTERMOUNTAIN EXPRESS CO.,  
a Corporation,

Appellee.

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Transcript of Record  
In Two Volumes

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Volume I  
(Pages 1 to 22)

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FILED

DEC 20 1957

PAUL E. GIBBEN, CLERK

Appeal from the United States District Court for the  
District of Oregon



No. 15603

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Portland 4, Oregon,  
For Appellees.



In the United States District Court  
for the District of Oregon

Civil No. 8508

CONVERSE TRUCKING SERVICE, a Corpora-  
tion,

Plaintiff,

vs.

PACIFIC INTERMOUNTAIN EXPRESS CO.,

Defendant and Third Party Plaintiff,

vs.

DONALD H. NOTEBOOM,

Third Party Defendant and Counterclaimant.

Civil No. 8834

SAMACK, INC., an Oregon Corporation,

Plaintiff,

THE HOME INSURANCE COMPANY, a New  
York Corporation; and PHOENIX INSUR-  
ANCE COMPANY, a Connecticut Corpora-  
tion,

Intervening Plaintiffs,

vs.

PACIFIC INTERMOUNTAIN EXPRESS CO., a  
Nevada Corporation,

Defendant.

### PRETRIAL ORDER

The above causes came on regularly for pretrial  
conference before the Honorable Gus J. Solomon

on Monday, February 25, 1957 (the parties having heretofore stipulated that the causes be consolidated for trial); Converse Trucking Service, Donald H. Noteboom and Samack, Inc., appeared by Charles H. Crookham; the intervening plaintiffs, The Home Insurance Company and Phoenix Insurance Company, appeared by Robert Clapperton and Irving Rand; defendant appeared by John Gordon Gearin.

The parties, with the approval of the Court, agree to the following

### Statement of Facts

#### I.

Converse Trucking Service is a California corporation; Donald H. Noteboom and Samack, Inc., are residents of Oregon; The Home Insurance Company is a New York corporation; Phoenix Insurance Company is a Connecticut corporation; and defendant is a Nevada corporation.

#### II.

The amount in controversy, exclusive of interest and costs, exceeds the sum of \$3,000.

#### III.

On or about the 7th day of March, 1956, a collision occurred between a tractor and two trailers operated by Converse Trucking Service and a certain truck and trailer owned and operated by Pacific Intermountain Express Co. Said collision occurred on Oregon State Highway No. 58 near the Crescent Lake Junction, as a result of which the above

described motor vehicles received property damage and plaintiff Noteboom, received personal injuries.

#### IV.

Intervening plaintiff, The Home Insurance Company, on the 7th day of March, 1956, insured 50 per cent of the value of the aforesaid tractor owned by plaintiff, Samack, Inc., against collision or upset for all damages in excess of \$1,000. Intervening plaintiff, Phoenix Insurance Company, on the 7th day of March, 1956, insured 50 per cent of the value of the aforesaid tractor owned by plaintiff, Samack, Inc., against collision or upset for all damages in excess of \$1,000.

Following said collision each intervening plaintiff loaned to Samack, Inc., the sum of \$2,384.73, with the understanding and agreement that Samack, Inc., would repay said sums from, and only from, the recovery made by it from the party or parties legally responsible for said damage. As security for the said agreement of repayment plaintiff, Samack, Inc., pledged to intervening plaintiffs its said claim for said damaged tractor against the defendant.

Contentions of Converse Trucking Service,  
Donald H. Noteboom and Samack, Inc.

#### I.

That at the time of the occurrence of the accident as aforesaid, the equipment operated by Donald H. Noteboom consisted of a tractor and two trailers; that the tractor operated by Donald H. Noteboom was owned by Samack, Inc., and was under lease

to and under the exclusive possession and control of Converse Trucking Service, and that Donald H. Noteboom was an agent and employee of the Converse Trucking Service; that the two trailers pulled by the aforesaid tractor were owned by Converse Trucking Service.

## II.

That the sole and proximate cause of the collision between the vehicles operated by Donald H. Noteboom and the vehicle of Pacific Intermountain Express Co. was the carelessness, recklessness and negligence of Pacific Intermountain Express Co. in the operation of its vehicle in the following particulars:

a. In operating said vehicle at a high, dangerous and reckless rate of speed under the circumstances then and there existing;

b. In failing to maintain a proper lookout, and especially a lookout for the vehicle operated by Donald H. Noteboom;

c. In failing to yield one-half of the highway to the vehicle operated by Donald H. Noteboom;

d. In failing to drive as close as possible to the right edge of said highway;

e. In failing to have the vehicle under proper or any control.

## III.

That as a proximate result of the negligence of Pacific Intermountain Express Co., these parties have been damaged as follows:



1. Converse Trucking Service has been damaged due to the foregoing to the extent of \$2,026.68.

2. Samack, Inc., has been damaged as a result of the foregoing to the extent of \$11,456.37.

3. That Donald H. Noteboom has been damaged as a result of the foregoing by suffering personal injury in that he sustained multiple contusions and abrasions of the body, laceration of the left knee and left elbow, acute sprain of the left ankle, laceration proximal to the metacarpal phalangeal joint between the ring and middle finger on the dorsum of the left hand; a concussion of the head, and required services of physicians and surgeons, and was generally damaged in the sum of Thirty-five Thousand Dollars (\$35,000.00) general damages, and has been unable to work for one month and sustained special damages for loss of wages for one month in the sum of Seven Hundred Fifty Dollars (\$750.00), and has incurred medical and hospital expenses and sustained special damages in the sum of Two Hundred Forty-one and 60/100 Dollars (\$241.60); that the injuries complained of as aforesaid are permanent.

\* \* \*

Pacific Intermountain Express Co. denies the foregoing.

#### Stipulation as to Intervening Plaintiffs

The parties hereby stipulate that in the event of a verdict or the finding of the Court herein to the effect that Samack, Inc., is entitled to the recovery of any damages for injuries to said tractor that a

judgment in favor of the intervening plaintiffs and against the defendant shall be entered herein to the extent of said damages up to, but not exceeding the sum of \$4,769.46, and that the amount of said judgment in favor of the intervening plaintiffs shall be deducted from the award, if any, so made in favor of Samack, Inc.

Contentions of Pacific Intermountain  
Express Co.

I.

The accident to which reference has heretofore been made was caused proximately by the negligence of Donald H. Noteboom in the following particulars:

- a. He operated the tractor and two trailers at an excessive rate of speed;
- b. He failed to keep his rig under proper control;
- c. He failed to drive the rig on the right half of the highway;
- d. He failed to maintain proper lookout.

II.

As a proximate result of the foregoing negligence of Donald H. Noteboom, the truck and trailer of defendant were damaged and depreciated in value, and Pacific Intermountain Express Co. lost the use thereof, thereby suffering damage in the sum of \$1,501.52.



The foregoing contentions of Pacific Intermountain Express Co. are denied by Converse Trucking Service, Donald H. Noteboom and Samack, Inc., except they admit the amount of damages sustained by Pacific Intermountain Express Co.

### Issues to Be Determined

1. Was defendant guilty of negligence in one or more of the particulars charged, and if so, was such negligence a proximate cause of the accident?

2. Was Donald H. Noteboom guilty of negligence in any particular as charged, and if so, was such negligence a proximate cause of the accident?

3. Was Samack, Inc., at the time and place of the accident legally responsible for the acts and conduct of Donald H. Noteboom?

4. What are the amount of damages sustained by (a) Converse Trucking Service; (b) Samack, Inc., and (c) Donald H. Noteboom, (d) Pacific Intermountain Express Co.?

### Exhibits

The following exhibits have been identified, the parties agreeing that further identification is not necessary, but that objection to any of said exhibits shall be made only on the grounds of materiality, relevancy or competency:

#### I. Exhibits of Converse Trucking Service

- (1) Deposition of Sherman E. Clancy;
- (2) Repair estimate of Fruehauf Trailer Co.;
- (3) Photographs (a) through ( ), inclusive.

## II. Exhibits of Samack, Inc.

- (9) Lease agreement with Converse Trucking Service;
- (10) Photographs (a) through ( ), inclusive;
- (11) Statement of truck expenses.

\* \* \*

## III. Exhibits of Donald H. Noteboom

- (17) Bill of Edward Davis, M.D.;
- (18) Bill of Drs. Rees, Haslinger, Nichols & Bline;
- (19) Deposition of Dr. George W. Teller.

\* \* \*

## IV. Exhibits of Pacific Intermountain Express Co.

- (22) Sealed exhibit for impeachment purposes only;
- (23) Photographs (a) through (1), inclusive;
- (24) Map;
- (25) Depositions of Donald H. Noteboom and Hy Sadoff;
- (26) Tachograph cards;
- (27) Driver's log;
- (28) Tractor service report;
- (29) Complaint—Converse Trucking Service vs. Pacific Intermountain Express Co.;
- (30) Complaint—Samack, Inc., vs. Pacific Intermountain Express Co.
- (31) Reserved for medical reports.

V. Exhibits of Home Insurance Company and  
Phoenix Insurance Company

- (32) Loan receipt of Home Insurance Com-  
pany;
- (33) Loan receipt of Phoenix Insurance Com-  
pany.

It Is Hereby Ordered that the foregoing is the  
Pretrial Order in the above-entitled cause, and that  
it supersedes the pleadings which are hereby  
amended to conform hereto, and that the Pretrial  
Order shall not be amended, except by consent or  
by Order of the Court to prevent manifest in-  
justice.

March 20, 1957.

/s/ GUS J. SOLOMON,  
U. S. District Judge.

The Foregoing Form of Pretrial Order Is  
Hereby Approved:

/s/ C. S. CROOKHAM,  
Of Attorneys for Converse Trucking Service, Sam-  
ack, Inc., and Donald H. Noteboom.

/s/ ROBERT CLAPPERTON,  
Of Attorneys for Intervening  
Plaintiffs.

/s/ JOHN GORDON GEARIN,  
Of Attorneys for Pacific In-  
termountain Express Co.

Lodged March 11, 1957.

[Endorsed]: Filed March 20, 1957.

In the United States District Court  
for the District of Oregon

Civil No. 8508

CONVERSE TRUCKING SERVICE, a Corpora-  
tion,

Plaintiff,

vs.

PACIFIC INTERMOUNTAIN EXPRESS CO.,  
Defendant and Third Party Plaintiff,

vs.

DONALD H. NOTEBOOM,

Third Party Defendant  
and Counterclaimant.

### JUDGMENT ORDER

The above-entitled cause came on regularly for trial before the undersigned Judge of the above-entitled Court and a jury on Wednesday, March 20, 1957, and continued until Thursday, March 21, 1957. Converse Trucking Service and Donald H. Noteboom appeared by Vergeer & Samuels, their attorneys, and Pacific Intermountain Express Co. appeared by John Gordon Gearin, of its attorneys. A jury was duly empaneled and sworn, following which opening statements were made and evidence on behalf of all parties was introduced. When all parties had rested and arguments to the jury were made, the Court with the consent of all parties submitted special interrogatories in the form of a ver-

dict to the jury, which were answered by the jury as follows:

“We, the jury, answer the special interrogatories as follows:

“1. (a) Was Sherman E. Clancey, the driver of the Pacific Intermountain Express Co., truck and trailer, guilty of negligence?

“No.

“(b) Was Donald H. Noteboom guilty of negligence which cause or contributed to the accident?

“No.

“2. (a) Was Donald H. Noteboom, the driver of Converse Trucking Service, truck and trailer, guilty of negligence?

“No.

“(b) Was Sherman E. Clancey guilty of negligence which caused or contributed to the accident?

“No.

“3. What damages did Donald H. Noteboom sustain by reason of the injuries he suffered in the accident?

“\$8,711.00.

“4. What damages did Samaek, Inc., sustain?

“\$7,529.00.



“Dated this 21st day of March, 1957.

“VICTOR FERGUSON,  
“Foreman.”

Said special verdict was received and filed, and based thereon the Court, being fully advised in the premises:

Now Orders that Converse Trucking Service and Donald H. Noteboom take nothing by their respective complaints, and the Pacific Intermountain Express Co. have judgment in its favor with regard to the claims of Converse Trucking Service and Donald H. Noteboom; and

It Is Further Ordered that Pacific Intermountain Express Co. take nothing by its counterclaim against Converse Trucking Service and Donald H. Noteboom; and

It Is Further Ordered that Converse Trucking Service and Donald H. Noteboom take judgment in their favor against Pacific Intermountain Express Co. with respect to said counterclaim.

Dated, this 27th day of March, 1957.

/s/ GUS J. SOLOMON,  
Judge.

[Endorsed]: Filed March 27, 1957.

[Title of District Court and Cause.]

MOTION

Come now Donald H. Noteboom, Samack, Inc., an Oregon Corporation, The Home Insurance Company, a New York Corporation and Phoenix Insurance Company, a Connecticut Corporation, and Converse Trucking Service, a corporation, and move the Court for an Order setting aside the judgment entered herein, and the findings of the jury with respect to the considerations of negligence submitted to it upon which said judgments are based, upon the following grounds:

I.

That the findings of the jury on the questions of liability submitted to it are inconsistent and are insufficient to support the judgment.

IRVING RAND,  
ROBERT CLAPPERTON,  
VERGEER & SAMUELS,

By /s/ DUANE VERGEER,  
Of Attorneys for Converse Trucking Service,  
Donald H. Noteboom and Samack, Inc.; The  
Home Insurance Company and Phoenix Insurance Company.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 29, 1957.

[Title of District Court and Cause.]

### ORDER

The motion of Converse Trucking Service and Donald H. Noteboom for new trial came on regularly to be heard before the undersigned Judge of the above-entitled Court on the 15th day of April, 1957. The said Converse Trucking Service and Donald H. Noteboom appeared by Duane Vergeer of their attorneys, and Pacific Intermountain Express Co. appeared by John Gordon Gearin of its attorneys. The Court having heard arguments of counsel and being fully advised:

Now Orders that the motion for new trial be, and it is hereby denied.

Dated, this 15th day of April, 1957.

/s/ GUS J. SOLOMON,  
Judge.

[Endorsed]: Filed April 19, 1957.

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[Title of District Court and Cause.]

### NOTICE OF APPEAL

To the Clerk of the District Court of the United States for the District of Oregon; Pacific Intermountain Express Co., Defendant and Third Party Plaintiff; and John Gordon Gearin, Its Attorney, Greetings:

You and each of you will please take notice that Converse Trucking Service, a corporation, Plain-



tiff, and Donald H. Noteboom, Third Party Defendant and Counter-Claimant, do hereby give notice of appeal to the United States Court of Appeals for the Ninth Circuit from that certain judgment entered herein in favor of Pacific Intermountain Express Co. and against Converse Trucking Service and Donald H. Noteboom.

Dated this 14th day of May, 1957.

VERGEER & SAMUELS,

By /s/ DUANE VERGEER,  
Of Attorneys for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 15, 1957.

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[Title of District Court and Cause.]

### CERTIFICATE OF CLERK

United States of America,  
District of Oregon—ss.

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Pretrial order; Special interrogatories; Judgment order; Motion for new trial; Order denying motion for a new trial; Notice of appeal; Bond for costs on appeal; Statement of points; Designation of contents of record on appeal; Order to transmit exhibits to Court of Appeals and Transcript of docket entries,

constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 8508, in which Converse Trucking Service, a corporation is plaintiff and appellant; Donald H. Noteboom is Third-party defendant, Counter-claimant and appellant and Pacific Intermountain Express Co. is the defendant and third-party plaintiff and appellee; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant, and in accordance with the rules of this court.

I further certify that there is enclosed herewith Exhibits 3-A through F; 10-A through G and 23. The reporter's transcript of proceedings will be forwarded as soon as it is filed in this office.

I further certify that the cost of filing the notice of appeal, \$5.00 has been paid by the appellants.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 18th day of June, 1957.

[Seal]

R. DeMOTT,  
Clerk.

By /s/ THORA LUND,  
Deputy.

[Endorsed]: No. 15603. United States Court of Appeals for the Ninth Circuit. Converse Trucking Service, a Corporation and Donald H. Noteboom, Appellants, vs. Pacific Intermountain Express Co., a Corporation, Appellee. Transcript of Record. Appeal From the United States District Court for the District of Oregon.

Filed: June 19, 1957.

Docketed: June 26, 1957.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for the  
Ninth Circuit.

The United States Court of Appeals  
for the Ninth Circuit

No. 15603

CONVERSE TRUCKING SERVICE, a Corpora-  
tion,

Plaintiff-Appellant,

vs.

PACIFIC INTERMOUNTAIN EXPRESS CO.,

Defendant and Third  
Party Plaintiff-Appellee,

vs.

DONALD H. NOTEBOOM,

Third Party Defendant and Counterclaimant-  
Appellant.

APPELLANTS' STATEMENT OF POINTS

Come Now, Converse Trucking Service, a corporation, and Donald H. Noteboom, the Appellants herein, and present the following as a Statement of Points upon which they intend to rely in their several appeals of the above-entitled cause to the United States Court of Appeals for the Ninth Circuit:

I.

That the findings of the jury on the questions of liability submitted to it are inconsistent and are insufficient to support the several judgments.

Dated this 24th day of June, 1957.

VERGEER & SAMUELS,

By /s/ C. S. CROOKHAM,

Of Attorneys for Appellants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 26, 1957.

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